Greater Horn of Africa

Peace Building Project

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National Dialogue in Kenya: Religious Organizations and Constitutional Reform, 1990-2000

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in Controlling Violent Conflicts and Building Peace
A Study of Three Approaches in the Greater Horn of Africa

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Executive Summary

This study examines the extent to which religious organizations have contributed to the management (or escalation) of the conflict over constitutional reform in Kenya during the transition period from 1990 to 2000. Constitutional review is the most significant transition conflict in Kenya today and, given the uncertainty it engenders, it has stalled at several points and been characterized by sporadic violence. Religious organizations have pursued a variety of roles to promote dialogue and peaceful resolution of conflicts whenever the reform process has stalled.

This study examines how three mediation processes unfolded and what impact they had on the conflict. First, we examine the mediation between the government and the National Convention Executive Committee (NCEC), the main reform lobby in 1997. Even though this mediation effort was abandoned, it was chiefly responsible for the follow-up negotiations among parliamentary politicians that resulted in the constitutional, legal, and administrative reforms of 1997. These reforms made the December 1997 elections possible.

Second, we examine the effort to contain the possibility of a violent upheaval in the aftermath of the problematic elections of 1997. The church was, in this instance, chiefly responsible (and not without intense criticism) for urging acceptance of the results. This was at a time when the opposition leaders had united to demand a new election, and the NCEC called for a rejection of the results and mass rallies, which could have led to the kind of extreme volatility that had occurred in rallies organized in late 1997.

Third, we examine the on-going mediation effort in which the churches have moved from being pure mediators to active agitators for a particular process of reform. This present initiative, dubbed the Ufungamano Initiative, is built upon the previous role by religious organizations in mediating between the government and the pro-reform groups. While it is too early to uncover the overall impact of this present mediation, in terms of the six factors central to the study's framework there are notable qualitative impacts in four. In the other two there has been minimal impact.

One effect of the present intervention is that it has restarted the process of constitutional reform. Another, perhaps on the negative side, has been to deepen mistrust between the incumbent regime and the opposition and civil society, as well as within the opposition. There is evidence of increased polarization and potential for, or actual, violent confrontation. The mediation effort has had very little impact on public institutions such as the provincial administration or the police, the two organs usually active in the transition conflicts. The effort may actually have a negative impact on parliament and political parties. Finally, the impact on socio-economic factors and on the social structures that frame the conflict and the larger transition have been minimal and in fact beyond the expectations of the intervention.

At present, the consequences of the transformation of the religious organizations from mediators to central contenders under the Ufungamano Initiative are unclear. Moreover, the recent experience of a build up in tension, escalating to violent confrontation and

sometimes breakthrough negotiations among elites does not offer a clear indication of the direction the current stalemate may take. Given the track record of mediated settlements, especially as parties to a conflict experience “hurting stalemates,” however, there remains a credible possibility that the stalemate will eventually be resolved peacefully. Indeed, at the completion of this report, the Ufungamano Initiative and the Parliamentary Constitution Review Commission were on the verge of merging but at the cost of an imminent splinter within the Ufungamano groups. Once again, the consequences of this, if it happens, are unclear.

Introduction

This study examines the extent to which religious organizations have contributed to the management (or escalation) of the conflict over constitutional review in Kenya during the transition period from 1990 to 2000. While the immediate focus is on the dialogue unfolding in 2000, two other junctures at which religious organizations were critical actors in mitigating conflict are examined.

Constitutional review is the most significant transition conflict in Kenya today. It is given particular weight because it is tied irrevocably to the succession of President Daniel arap Moi, who, in his twenty-second year in office, is serving his last term under the current constitution. As the most significant change in the rules governing politics, constitutional change invariably causes a great deal of uncertainty, especially in the context of an intransigent, former single-party, authoritarian regime battling to hold onto power.

In tandem with the country's broader transition from authoritarian rule since 1990, constitutional change toward a more democratic dispensation has failed to take root due to a range of interests and circumstances that have conspired to preserve the status quo. Among these factors, two are key: a) the nature of the culture of politics, in particular, its ethnic and patrimonial bases; and b) complications arising from a sustained economic decline since 1990. These underlying factors are manifest in the intransigence of the incumbent regime, in a divided opposition, and in the violence that has attended the conflict over constitutional change and the broader transition. The openings available to civil society since 1991 have made for an unstable, if promising, environment for broad-based mobilization and agitation for reforms. The fact that these have produced little structural change has led to rising tension and even consideration of more radical responses to force change. [1]

The current debate over constitutional review is the culmination of agitation that started in earnest in 1994 with the publication of the Model Constitution by the Citizens' Coalition for Constitutional Change (4Cs), one of the first organizations devoted to pressing for constitutional change. This early attempt to seek constitutional reform was a reaction to the 'incomplete' transition that took place in 1991 with the repeal of Section 2A of the constitution, which had legalized the single-party state in 1982 (Barkan 1993; 1998). While the repeal allowed for opposition parties to form and practice legally, it left in place a matrix of laws that undermined further democratization (Ndegwa 1998; Tostensen et al. 1998). Many of these laws were holdovers from the colonial period (especially the emergency era) and undermined the many liberal principles espoused in the Constitution and which are necessary for a functioning multi-party system. These included restrictions on assembly, sedition laws, and party registration mechanisms controlled by the Executive, among

[1] For example, a recent statement by the otherwise sober opposition MP Peter Anyang Nyongo that the Moi regime leaves no option than to be removed by "any necessary means" is telling of the level of frustration. (See Daily Nation editorial August 21, 2000, p. 6).

others. These constitutional, legal and administrative obstacles resulted in severe compromises in the multi-party founding elections of 1992. As a result, the former single-party, the Kenya African National Union (KANU), was able to retain power and shape the subsequent phases of the democratization attempt.

Indeed, throughout Kenya's post-independence history, the constitution has played a significant role in elaborating authoritarian rule (e.g., Ndegwa 1997). For example, between 1963 and 1997, the constitution had been amended over thirty times (IED 1997). With the exception of the repeal of Section 2A in 1991 and the Inter-Parliamentary Parties Group (IPPG) reforms in 1997 (see below), all of the amendments had the effect of restricting the liberties of individuals and groups, while enhancing the power of the Executive at the expense of Parliament.

In the context of the Kenyan transition—where the dominant party clearly subsists on this warped constitutional heritage and where the opposition parties have long been locked out of power by constitutional and extra-constitutional designs (including political violence)—constitutional review is a watershed event. Disagreement over constitutional reforms, both in terms of *process* and *substance*, therefore, makes for a great deal of uncertainty. As a result, it generates intense political conflict and potential for violence as stakeholders envision losses of power and access to resources in a new institutional setting (and, very likely, a change of guard).

Two issues underscore the centrality of constitutional reform. First, the very convoluted and long drawn-out conflict over the *process* of reviewing the constitution is indicative of the stakes involved. Since at least 1994 there have been several proposals on the process offered by both the government and opposition, and each has been characterized by deep conflict among elites. Second, since 1991 and especially after 1997, there has been a rise in the prominence of violence (principally from the state and non-state organs colluding with it) and in the propensity for mass action (by civil society and opposition agitators) as tools for asserting preferences.

Politically instigated violence, especially the precipitation of ethnic conflict, has increasingly become part of the political discourse on fundamental issues (e.g., see Daily Nation editorial, August 27, 2000, p. 6). The recurrence of ethnic clashes since 1991 has shown that violence emerges whenever the regime feels substantially threatened by opposition forces. Moreover, the rhetoric that comes from some leaders within the regime establishes a link between such violence and their program for ensuring their political survival and the preservation of existing structures, including the constitution, that make this possible (Kiliku Report).

It is in the midst of such uncertainty and at critical junctures punctuating the elongated process of constitutional reform that the religious community has pursued a variety of roles to promote dialogue and peaceful resolution of conflicts. Apart from the immediate protagonists (KANU, opposition parties, and constitutional reform lobby groups), religious organizations have had the most influence on the process. The religious organizations are principally the National Council of Churches of Kenya (NCCK), an umbrella body of

mainstream protestant churches, and the Catholic Church, ostensibly the largest Christian denomination.[2] Other religious faiths such as the Muslims and the Hindus have only lately (2000) joined the formal intervention to mitigate the conflict.

This study seeks to highlight how the religious community in Kenya has intervened in the constitutional conflict, in promoting a national-level dialogue to mitigate or solve the conflict, and what effect it has had.

[2] Other protestant groups, especially evangelical groups, have historically stayed away from such open political engagements but have lately been drafted by the state to counter the weight of the NCCK and Catholics when the state has found their positions disagreeable.

The Sources and Contours of the Conflict

As indicated earlier, the present conflict over constitutional review in Kenya is in fact only the latest episode in the long process of transition from authoritarian rule. Indeed, in a transition that is preoccupied with procedural questions and in which institutional reforms are viewed as a prerequisite to the substantive achievements that have eluded oppositionists, constitutional review represents the foremost battleground between political groups. Conflict over constitutional reform, therefore, encapsulates the concerns of the broader transition; and demands for it reflect the core sources of political conflict in Kenya. While some of these sources are fundamental to Kenya's political make-up and are therefore perennial in any conflict, they are discussed here briefly and narrowly in relation to the present conflict.

Sources of the conflict

Socio-economic sources: The social and economic propellants of conflict in Kenya are basically the ethnic and patrimonial bases of politics, and the precipitous decline in the economy, respectively. Like many other transitioning states in Africa, the Kenyan polity has retained its ethnic and patrimonial bases of politics even as it has democratized. Even as politics have liberalized and elections have taken root, the nature of power has remained the same: concentrated in the hands of a few (often one most powerful man) ruling through a network of loyal leaders beholden to the center through ethnic and/or patronage ties. Indeed, this is reflected in the structures of political parties, which tend to be dominated by one man, often with a small clique of financial backers. The use of patronage to secure loyalty and support remains a cornerstone of politics even in the emerging electoral democracies. This affects not only the agenda for change (fewer patrimonial relations), but also how 'progressives' (who are often themselves similarly structured) organize to seek change and the institutional structures they encounter (which are often biased and beholden to the incumbents).

The economic decline over the last decade has affected constitutional questions in a number of ways. As noted elsewhere in Africa (Bratton and Hyden 1992), economic decline and the effects of structural adjustment throughout the 1980s precipitated the demands for political change. In Kenya, the pressure for change has continued especially as the economy has continued to slow down. The demands for change arise out of a critique of the economic crisis as a result of misgovernance; therefore, constitutional review is seen as a way to ensure better governance structures. Moreover, the government has had to face the twin pressures of meeting expanded patronage obligations in its search for electoral support and parliamentary supremacy and facing diminished resources due to adjustment, withdrawal of aid, or stringent conditions. As a result, it has had to engage in the stripping of public assets (e.g., giving away public land or selling off parastatals to supporters) (Klopp 2000). This practice fuels the perception of a runaway corrupt regime, whose only antidote is progressive constitutional reform.

Social Structures: Patrimonial networks and competition for power and resources are largely ethnic. With over forty ethnic groups, Kenya's politics have revolved around ethnic competition. In the first two decades of independence the dominance of the largest ethnic group, the Kikuyu, was virtually unchallenged. Under President Jomo Kenyatta, the Kikuyu dominated both politics and the economy, which, at that time, was a prosperous one with generous growth rates. Under President Moi, who comes from a minority ethnic group, ethnic politics have become more open and ethnic hostility has become especially pronounced since the introduction of multi-partyism. Under Moi, the discourse on ethnicity has ranged from claims of ethnic self-determination (*majimbo* or federalism) to violent ejection of some ethnic groups from the so-called ancestral areas of others to create ethnic enclaves. Structurally, ethnic consciousness has produced ethnically based political parties and voting patterns that are clearly ethnic.

Mobilization: Within this social structure, competition has taken on ethnic hues. Mobilization for political action, electoral participation, and recruitment into party structures has followed ethnic lines. This has added a difficult dimension to constitutional questions. When irreconcilable ethnic interests and perceptions color constitutional preferences, the impasse is insurmountable. This, indeed, is a recurrent theme in the transition and more specifically in the constitutional debate as groups organize along ethnic lines (or are viewed as such by opponents). Both the broader democratization movement and the narrower constitutional project have been viewed by the incumbent regime as purely ethnic enterprises to wrest power from the minority ruling ethnic groups. According to the incumbent government, the principal protagonists in the reform movement are Kikuyu and, to a lesser extent, Luo politicians.

Public Institutions and Processes: The nature and actions of public institutions have also affected how conflicts over constitutional reform have unfolded and concluded. The actions of leaders and especially the active promotion of, or passive attitude toward, conflict behaviors have contributed to the crisis in constitutional reform. Public institutions such as the provincial administration and the police and the structural dominance of the executive over parliament have made it difficult for opposition parties, groups and individuals to pursue actions that would promote constitutional change. For example, the provincial administration and the police have broken up political meetings and civic education campaigns, or stood by idly as violence has been meted out on opposition politicians, including two incidents outside Parliament buildings. Overall, the structures of governance remain too beholden to the government of the day to effect any neutrality that would help consolidate democratic gains.

Conflict Behaviors and Events: A number of specific events and trends have influenced the conflict by injecting a deep sense of suspicion and highlighting the possibility of violence. First, there were ethnic clashes in 1991-92, in which over 2000 Kenyans died and property worth millions of shillings was destroyed. A report by the Parliamentary Select Committee on the Ethnic Clashes (also known as the Kiliku Report, 1992) implicated the government, especially the provincial administration and leading KANU politicians, in the violence (e.g., by inciting speeches and arming combatants). These clashes involved perpetrators ostensibly from Kalenjin and Maasai ethnic groups against Kikuyu, Luo, Luhya, and Kisii

farmers, especially in the Rift Valley. These clashes were repeated yet again in 1997 in Mombasa and after the 1997 elections in a number of Central Province and Rift Valley districts. These episodes have firmly established a trend where communal violence instigated by politicians' incendiary statements in open forums with no legal consequences or government reproach has become part of the discourse of politics. As will be evident below, such violence, even at the gates of Parliament, has become commonplace (Daily Nation, August 27, 2000; August 21, 2000).

Finally, distrust between politicians runs deep. Part of this is inherent in the ethnic calculus of most politicians. However, much of it has also been learnt especially with regard to political relations in the post-transition era. For example, opposition politicians believe, with some credible evidence, that the last two elections were won by KANU through rigging and through a biased electoral system (Throup and Hornsby 1997; Tostensen et al. 1998). There is also a widespread notion that none of the state institutions (e.g., the courts, the police, the electoral commission, or the provincial administration) is neutral. All of them continually do the bidding of the incumbents. Finally, the ethnic conflicts in which the government has been implicated underscore for many in the opposition the extent to which the current government will go to retain power. On their part, incumbent politicians are concerned about loss of privilege and the possibility of being subjected to criminal prosecution for misdeeds. These misdeeds include widely noted corruption scandals, which the opposition has promised to pursue.

The factors cited above underlie and shape the difficulty over constitutional review. They exacerbate an already complicated transition and provide impetus for violence, both from within society and from the state or state-sponsored agents.

Contours of the conflict

The conflict over constitutional review is characterized by differences over substantive and procedural issues both in the short-term and in the long-term, but, most importantly, it is intensified by the uncertainty over the imminent succession. There is no such position as 'pro' or 'anti' constitutional review; indeed, each faction's position is colored (expectedly) by its calculations about the worst intentions of its adversaries and its best efforts to secure a post-succession future. Equally, there are no recognizable 'opposition' or 'KANU' positions; instead, there is a spectrum of positions with members of the same political party (especially the different factions in KANU [see Holmquist and Ford 1998]) often subscribing to different positions.

The core of the conflict has shifted at different stages from concerns with the substance of reform (in 1991, 1994, and 1997) to battles over the process (in 1995, 1999, and 2000). At present the most animated conflicts are over the process of reform. As will be evident, the two issues are not wholly detached, because the process ultimately determines the possibility for each side's substantive concerns. Indeed, the 'process' concerns are often expressed with clear designs on particular substantive outcomes.

Procedural Concerns

Fundamentally, a broad, somewhat philosophical, debate underlies the conflict over the process. Apart from the specific rules of the review process, there is also debate over the orientation of the process of constitution making. The debate is cast in terms of Parliament-led and people-driven processes. Although this is an over-simplification, it is expressive of both the emotions, the underlying philosophical orientations, and the strategies of the contenders. KANU, which has a majority in Parliament buoyed by its current cooperation with the National Democratic Party (NDP), prefers a process contained within Parliament. This indeed is the position held from the beginning by KANU. It is one that has credible legal and technical backing and that recent history suggests has been the most frequent method of resolving impasses (e.g., the repeal of Section 2A, and the IPPG reforms). It is also one that is largely in tune with the historical experience outside francophone African countries, where sovereign national conferences (as envisioned by the NCEC) have not been the norm.

The mainstream opposition, civil society organizations, and religious organizations have consistently pushed for a more open, "people-driven" process. Their position derives from an understanding of the constitutional review process as one of remaking a social contract, which cannot be concluded by representatives but by the people themselves. This view is consistent with the predominant view within the opposition, including much of civil society, that the constitution as well as the broader social contract is tattered, not the least due to the decadence in Parliament and parliamentary opposition parties. As a consequence, these groups, which have managed to keep the constitutional review agenda alive through their activity in civil society, have been pressing for a more inclusive process.

Underlying the mainstream opposition's positions is concern that the KANU regime is not interested in comprehensive review. This position is borne out by several utterances from KANU, such as the recurrent attempt to popularize the notion that Moi should serve beyond the constitutional two-term limit. Most recent is the proposal contained in the Parliamentary Select Committee's (PSC or Raila Committee) report and bill transmitted to Parliament, which proposed to delete the directive in the Constitution of Kenya Review Act of 1997 to pursue a comprehensive review of the Constitution. However, it is also clear that the debate itself contains much posturing and grandstanding as well as 'mining' for technical and other faults that can be construed to be furthering narrow or partisan interests. These can then be drawn out if necessary when one side loses the political debate. This occurs on all sides.

It is in this context that the three issues that have successively been at the center of the disagreement should be understood. While the first two have already been resolved (if unsatisfactorily), they reflect the kind of conflict it is and its iterative nature.

One is the disagreement over the internal procedures outlined in the Constitution of Kenya Review Act (1997).[3] Two disagreements are prominent: how the 13 seats allocated to commissioners appointed by political parties would be distributed, and how and to whom the seats allocated to the Women's Political Caucus should be handed out. Several other disagreements appear ephemeral because they have not figured prominently in public debates, although critical reviews of the process have highlighted them. These are, for example, whether the commission's chair is elected or is appointed by the president, whether the review should result in constitutional amendments or a new constitution altogether, and whether the final product of the commission will be approved by referendum or by Parliament.

A second area of disagreement arises from the agreement that the Review Act should be revised in order to streamline the process which, given recent experience, was seen as unwieldy and prone to breakdowns. There are several areas of contention here. One is the demand that all stakeholders named in the Act as a result of the Safari Park consensus be involved in its revision in an open negotiation forum. Second, there are those who argue that only Parliament is empowered to review the Act since it is now firmly in the purview of parliamentary business not public negotiation. Those who oppose the latter assert that the Raila Committee appointed to review the Act actually operated in a legal vacuum, as the motion that led to its creation was illegal according to parliamentary rules. As a result, these groups, including opposition parliamentarians, boycotted both the committee's hearings and the debate and vote to adopt its report in Parliament. Finally, there was disagreement among MPs about the rules of adopting the bill resulting from the skewed hearings of the Raila Committee. The debate centered on whether the bill required an absolute majority or a simple majority of the quorum or of the entire body. Characteristic of the moves that intensify distrust, this point was made moot, however, when the vote was taken when most of the opposition MPs were out of Nairobi and there was an escalating fear of a snap general election that might overtake events.

A third area of conflict is precisely the result of the lack of resolution of the first two and remains (at the time of writing) a critical problem in the conflict. This is the fact that the continued failure to resolve the earlier conflicts has produced two independent processes of reform, with obvious implications for a peaceful resolution of the larger conflict on constitutional reform and the overall democratic transition. This is also the central form and result of the religious organizations' intervention in the evolving conflict. The details of the intervention and its effects are discussed in a later section.

[3] This discussion uses the present tense since these issues are outstanding even though the incumbent government and its supporters have unilaterally decided them. They remain open questions and fundamental to the evolving conflict even as new issues arise and are likely to be revisited.

Substantive Disagreements

While substantive issues are too complex to explore in detail in this report (see, e.g., Kibwana; Maina; Mazrui; Mutua; Mutunga 1998; Ndegwa 1997), a few clearly affect the dialogue on the constitutional review process. All sides share the obvious recognition that a triumph on the process goes a long way toward securing substantive preferences. The substantive disagreement is over a range of issues, but the most significant factors fueling disagreement include the two-term limit that KANU would wish to eliminate in order to ease the succession debate.[4] But even this is inarticulate from our findings as some in KANU emphasized that it did not mean that, with the elimination of the two-term limit, KANU would automatically nominate President Moi–-ostensibly the immediate beneficiary of such a change. Indeed, members of the KANU fringe would be opposed to a third term for President Moi.

Furthermore, one KANU minister asserted that the opposition was in fact not interested in constitutional reform since, with the two-term limit in place, they are assured that Moi—whom they see as the main obstacle to their acquiring power—would exit. This, however, is not a position espoused or even alluded to by any of the pro-reform activists interviewed.[5] Other concerns are actually common to politicians on both sides and therefore do not feature openly in debates. For instance, the executive powers of the president have been of concern to both sides of the debate, such that even incumbent politicians are wary of the 'imperial' presidency and the extent to which its arbitrary powers are constitutionally sanctioned or arise out of inarticulate checks and balances.

On the other hand, there are broader 'exit' concerns for incumbent regime politicians and these have periodically come to the fore in interesting ways. For example, in 1998, nominated opposition MP Anyang Nyongo sponsored a motion to generously fund the retirement and the security of all retired presidents. More recently, and much to the chagrin of some, the NCEC proposed clemency for regime politicians to encourage them to give up power. Indeed, among the KANU rebel fringe interviewed, there was a feeling that these 'transitional justice' issues are major preoccupations of the ruling clique. Such issues must be dealt with soon or they will contribute to bottlenecking the process as incumbent

[4] We can only discuss the substantive issues that animate the current debate. There are indeed more substantive issues touching on the frameworks of government various factions propose or that have been introduced in the decade-long discussion over constitutional review. The menu of substantive proposals remains long and imaginative and ranges from crass *majimbo* or separatist designs to more constitutionally grounded federalist proposals; from liberal models such as the one proposed by the 4Cs in 1994 to more academic treatises such as those spelled out by scholars such as Ali Mazrui, Makau wa Mutua, Wachira Maina, Willy Mutunga, Gibson Kuria, and especially Kivutha Kibwana, among others.

[5] Given the personalistic calculus of several opposition politicians and the lack of institutional strategies, however, this may not be far from the truth.

politicians seek the best possible guarantees in the procedures to secure their power in perpetuity or, at a minimum, a safe exit.

In the spectrum of substantive demands articulated in the debate there is a faction that seeks comprehensive reform for democratization and re-negotiation of institutions of governance and nationhood. On the other hand, some factions are seeking to secure protection from the opposition. The 'kitchen cabinet' for instance is preoccupied with perpetuating itself in power and at the very least securing protection from a vindictive emergent regime. Others, such as the leading opposition parties, have more immediate electoral and succession agendas. The most common concern for all of the factions, however, is to restart the process, albeit in a form that does not undermine each's core substantive concerns. Indeed, it is this common interest and the fact that the process had effectively stalled that gave the religious organizations an entry point and leverage to mediate.

The Intervention: A Multi-Phase Engagement

The current intervention by religious organizations in spearheading a civil society-directed constitutional review agenda is the culmination or continuation of a process that started in the early 1990s. The so called Ufungamano Initiative is built upon the especially prominent role played by religious organizations in mediating between the government and the then main constitutional reform lobby group, the Nation Convention Executive Committee (NCEC) in 1997. It is further built upon the experience of mediating the volatile situation following the second flawed elections of December 1997/January 1998.

As will be evident below, the achievements and lessons of previous engagements shape the present activity. Other than these two activities highlighted here, the religious organizations were also involved in the agitation for a multi-party system in 1990-91; and in the campaign to ensure free and fair elections in 1992. We focus on the initial brokering that led to the constitutional and administrative reform package known as the Inter-Parliamentary Parties Group (IPPG) reforms in 1997 and the management of the volatile aftermath of the second elections in 1998, because these are the closest in line with the current peace-building effort.[6]

Mediation in 1997: Constitutional Reform for Elections

In 1997 the religious sector's entry into the fray over constitutional review was spurred by the widespread belief that the country was tottering on the brink of a conflagration, as constitutional reform lobbies, notably the NCEC, pushed relentlessly for reforms before the 1997 elections. The NCEC's tactics ranged from high-profile confrontations with the state to otherwise mundane, but significant, civic education and mobilization activities. Its most important tactic, however, was calling for general strikes and mass political demonstrations, which turned violent on several occasions. It engaged citizens by directly organizing popular meetings in both rural and urban areas, although most of its rallies were outlawed by the government and broken up by the police. Nonetheless, these mass conventions typically attracted thousands of citizens.

The NCEC mass activities, starting with a National Convention Assembly (NCA) in April 1997, escalated to public rallies that led to violent confrontation with the state. For example, on June 1, 1997, a public rally was brutally dispersed by the police. The same happened in the general strikes and rallies called the next month on July 7 or *saba saba*[7],

[6] Other instances of the churches' conflict-resolution and peace-building efforts include their mediation in the teacher's strike of 1998 and peace-building efforts after ethnic clashes, especially in the Rift Valley, since 1991.

[7] Subsequently, as part of a conscious emotive dramatization, the NCEC called general strikes and held rallies on days whose dates coincided with the numerical notation of the calendar month. Each occurrence was then referred to by the Kiswahili reference to the month and date, thus *SabaSaba* for the events of the seventh of July and so on.

August 8 (*nane nane*), September 9 (*tisa tisa*), and October 10 (*kumi kumi*). In these highly charged monthly mass meetings and demonstrations, the NCEC demanded constitutional reforms with the slogan, "No reforms, no elections." While the KANU regime refused to recognize the NCEC, much less move on reforms, the mass demonstrations escalated in intensity and spread to several towns. They reached their zenith in October when a Secret Police officer was killed in Nairobi Uhuru Park. By then the situation was clearly spiraling toward ungovernability, which was recognized by several observers, including the then US Ambassador, who, in separate private meetings with the protagonists, urged compromise.

The escalation of violence and the monthly descent into lawlessness was a situation that threatened NCEC's partners, especially opposition parties who had sided with it when it emerged as the most credible vehicle for demanding reforms. It was in this context of periodic lawlessness, intransigent protagonists, and indications that each side was searching for a way out that the religious organizations emerged as viable mediators between the two sides. According to one observer, "no one else could have bridged" the gulf between the NCEC and its opposition allies, on the one hand, and the KANU government, on the other.

The church's role as mediator emerged from its tradition of social engagement during the independence era and more pointed concern with matters political since the late 1980s. The 1980s were a time when the rest of civil society had been severely weakened by the single-party state, and the church (especially the NCCK) and the statutory Law Society of Kenya were the only organizations able and willing to speak out against authoritarian excesses. Moreover, given its neutrality in the 1992 elections, the church had carved for itself the role of encouraging forward and positive movement in reform without seeming to side with any particular group (or at least without the level of stridency that the political parties offered) (see, e.g., Ngunyi, n.d.).

Yet another source of the pressure for the church to intervene came from its institutional preference for managed transitions rather than 'change at any cost,' which, by October 1997, seemed a very likely possibility in Kenya. What seems evident is that the government, opposition, and civil society had reached an impasse and thus created an opportunity for a neutral party to engage in mediation. Therefore, when the religious community first proposed mediation, the KANU regime immediately embraced it as a way out of the impasse.

The crisis in late 1997 was itself a result of the incumbent government's lethargic pace on reform and the vacuum caused by a disastrously divided opposition. In May and June 1997, with elections anticipated anytime before January 1998, tension was very high due to the failure of the incumbent KANU regime to institute the comprehensive constitutional review promised by the President in 1995. Moi's 1995 plan was to invite foreign constitutional experts to review the constitution and have Parliament pass the actual amendments. Along with others such as the Law Society of Kenya (LSK) and opposition parties, the NCCK welcomed the announcement but emphasized local abilities to review the constitution and the need for Kenyans to be the captains of their own constitutional reform. Indeed, following this announcement, the NCCK and others readied themselves

to contribute to the review. In mid 1995, the NCCK invited several ambassadors for consultations about constitutional review and in May 1995 offered its views on the constitutional reform in a document named “Kenya: A Common Future.”

By 1996, with time dwindling for a comprehensive review before the second elections, the NCCK settled for a minimum reform agenda. In mid-1997 the NCCK approached the president and had three meetings with him, but no commitment to initiate the review was given by the president. However, by August 1997, the situation had changed drastically due to the mass action. The NCCK had to pursue shuttle diplomacy between the NCEC and the KANU regime. The shuttle diplomacy involved the religious leaders with the help of an emerging personality, Ambassador Bethuel Kiplagat, who put them in contact with high- level officials in government, opposition parties and the constitutional reform lobbies. These contacts included discussions between the clerics and the Attorney General, the KANU leadership, and, ultimately, the president (in a highly publicized visit to State House).

This initial mediation brokered by the religious organizations was overtaken by two somewhat contradictory events. One was its own success in focusing attention on compromise and the other was the effects of the *kumi kumi* (October 10) revolt in which the Secret Police offer was killed. This latter event forced opposition politicians to begin to put distance between themselves and the NCEC. The possibility of compromise among politicians within parliament appealed to both KANU and opposition parties. For the former, it de-radicalized the demands made on it by blocking out the NCEC (which they considered illegitimate and dangerously radical). Moreover, it contained the conflict in institutional structures of parliament where KANU dominated. For the opposition, the movement for reform had been hijacked by the highly successful NCEC; so, relocating the debate off the streets would put them back in control of the reform demand agenda. While the opposition politicians abandoned the NCEC, which made the entire reform process possible, the KANU regime abandoned the religious groups that had first broached the idea of compromise.

The religious initiative also benefited from a separate initiative that had been going on among parliamentarians. In this initiative, moderates from KANU were having regular meetings in Parliament with moderates in the opposition (outside the NCEC). Moreover, moderate politicians were meeting regularly at the residence of the German Ambassador, who was encouraging compromise. These groups of moderate MPs would later form the core group that engineered the IPPG reforms, which would carry negotiations through to the reforms of 1997, which, in turn, made elections possible.

With elections around the corner, the pressure was on to reach compromise on reforms to ensure that elections took place—an interest the incumbent KANU shared with its opposition. As a result, the IPPG package of reforms, which included the framework for a comprehensive review of the constitution, were adopted by Parliament in November 1997. Among the three parts of the IPPG package of reforms was the Kenya Constitutional Review Act (1997), which established a Commission to review the constitution after the

elections. This Act, which was to be amended in 1998, is at the center of the current debate.

The intervention by religious organizations in 1997 established a number of lessons for the church groups. First it established the churches as credible mediators in the most central conflicts of the transition. In particular, it established the churches' credibility in intervening in critical junctures when other options for conflict resolution were unavailable or undesirable. The churches also learned lessons from being sidelined by the government and politicians after they provided the impetus for negotiation. This reflected some of the limits of the churches' role as mediators since they did not have any significant carrots or sticks except moral suasion to bring combatants to the negotiating table.

Post-Election Containment of Conflict, 1998

In 1998 the religious groups played a critical role in ensuring that peace prevailed after the flawed elections of December 1997. The election was conducted on an uneven playing field even after the IPPG reforms, and clear illegalities compromised any possibility for a free and fair election (Kiai 1998; Barkan 1998). As a result, the immediate post-election period was one with palpable tension, which could erupt into violent confrontation at any time. The volatility was most pronounced when two leading opposition presidential candidates (Mwai Kibaki and Raila Odinga) joined together to reject the outcome as soon as Moi and KANU were declared the winners. They demanded a new election within 21 days, while the NCEC (fresh from successful mass action that contributed to the IPPG) was calling for a rejection of the results and mass rallies, with obvious implications for violent confrontation.

The religious groups (the NCCK and the Catholic Justice and Peace Commission), who were members of a three-body observer team funded by donors, urged acceptance of the results despite "overwhelming evidence" indicating the incumbent had "desperately manipulated the election" (Daily Nation, January 4 1998). The religious groups' intervention was seen by many as extremely questionable in that they declared an obviously flawed election free and fair. This verdict required a strenuous effort to stretch evidence that clearly pointed in the opposite direction. According to one church official defending their statement, they were simply saying, as everyone else, that the election was not free and fair, but not in the same words. Indeed, they argue, everyone participated in the election knowing fully well that the field was uneven (even after IPPG reforms) and, therefore, it was somewhat disingenuous of them to reject the results due to the outcome. They asserted that the practices and outcome on the polling day itself reflected substantively the choice people made.

According to one observer, the religious groups wanted Kenyans to accept the electoral outcome, especially that of the presidential election, so as to avoid predictable violence. There was significant violence, however, especially in the opposition stronghold of Central Province after Moi's closest challenger, Mwai Kibaki, lodged an election petition against the incumbent. The violence, ostensibly state-sponsored, targeted members of the Kikuyu ethnic group, especially in Laikipia district in Central province and in Njoro in the Rift Valley province. Moreover, a number of leading KANU leaders mobilized their supporters to issue threats against the ethnic communities associated with the opposition to discourage them from further challenging the Moi election in or outside the courts.

As one analyst notes, the churches' effort to "calm down the tension" was based on a clear strategy to minimize the possibility of a violent upheaval. According to Bishop Gitari, head of the Anglican Church, "It is better to accept a slightly rigged election than to have absolute chaos as alternative" (quoted in Spurk, 1999, p. 5). In the end, the elections were accepted, if grudgingly, and conflict was averted and channeled into parliament and the court system.

Return to Mediation, 1999-2000

After the post-election crisis was settled, attention turned to implementing the Constitution of Kenya Review Act, which had been adopted under the auspices of the IPPG in 1997. Hurriedly passed to allow for elections to take place and to buy time for each side as each anticipated prevailing in the election and thus managing the review, the Act had serious flaws that would soon arrest its implementation. Due to immediate disagreements in 1998, Parliament formed an Inter Parliamentary Parties Committee (IPPC) made up of 24 members of Parliament with the Attorney General as chair. This committee was to pursue dialogue both within Parliament and outside with stakeholders.

After receiving memoranda from the public about how the process of review should proceed, the IPPC invited presentations at the Bomas of Kenya from two representatives of each organization that had submitted a memo. Afterward, the IPPC opened up a broader process that brought in all parliamentarians and civil society groups to a negotiating forum at Safari Park. The intent was to seek a consensus on revisions to the Act. After plenary sessions, a twelve-person committee was appointed from all parties at Safari Park. It included six parliamentary politicians and six representatives of the civil society organizations in attendance. This committee was chaired by Bishop Sulumeti–-a reflection of the recognition of religious leaders as potentially impartial shepherds of the emerging consensus.[8]

The Sulumeti Committee drafted agreements reflective of the consensus reached by the plenary sessions. Indeed, according to one MP who was a member of the committee, everything in the committee's report and in the subsequent Act that reflected the Committee's draft was deliberately arrived at in order to achieve the greatest amount of consensus. For instance, at the Sulumeti committee very little was changed from what the plenary session had adopted and, further, very little of the committee's recommendations were changed in Parliament. Among the very few changes agreed to was a reduction in the number of commissioners from 77 to 25, which was seen as a more manageable number. In another instance, when the Social Democratic Party (SDP) presented a list of more than a dozen amendments to the report and subsequent bill then under discussion in Parliament, only eight of the amendments were accepted even though the parliamentarians agreed that they were all reasonable amendments. The hesitancy was based on the fact that the SDP—by its own choice—was not represented at the plenary and, therefore, to accommodate all its concerns could have unraveled the Safari Park consensus. According to interviewees, at the height of these negotiations a contact group of MPs regularly met on an informal basis in order to smooth out many of the potential disagreements. In November 1998, the amendments to the Act were adopted by Parliament and signed by the president to bring them into operation in 1999.

[8] Bishop Sulumeti was later to be accused by an NCEC representative of compromising himself and acting to promote the KANU agenda.

In 1999, the constitutional reform process stalled, however, as the various parties disagreed on the implementation of the Act. The initial hitch came over the nomination of women representing the Women Political Caucus, which KANU politicians saw as pro-opposition and dominated by urbane, educated women primarily from Central Province groups. An even more critical crisis arose when the nomination of the political party representatives who would make up 13 of the 25 commissioners stalled. KANU demanded a proportionate allocation of the seats, which would have given them over half the number of commissioners with the rest divided among the nine opposition parliamentary parties. Moreover, by mid 1999, the president had reverted to his original calls for a constitutional review process contained within Parliament. This had been his original position from which he was forced to compromise toward the more open process eventually adopted by IPPG in 1997 and the Safari Park consensus in 1998.

By late 1999 the impasse was seemingly unbreakable. This prompted the religious community to call on the Attorney General to re-assemble all the 54 stakeholders who negotiated the Safari Park consensus by November in order to reach a new consensus and re-start the process. The religious organizations threatened that, if he failed to call the meeting, they would sideline the government and convene the meeting themselves. At the same time the Catholic Church launched a civic education campaign to support the constitutional review process and, in a meeting with the president, urged the resumption of the process. The Law Society of Kenya also launched its own stakeholder workshop to energize stakeholders to re-start the process. In Parliament, National Democratic Party (NDP) leader Raila Odinga gave notice of a motion to request the Attorney General to convene a meeting of all stakeholders named in the Act to jump-start the process. In essence, Odinga's motion was the same as that of the religious leaders, indicating some level of collaboration. His move, however, was to become a stark contradiction and lead to the current conflict and sour relations between the NDP and the rest of the opposition and the churches.

Pressure mounted, as evidenced by the daily newspaper commentary and press statements by politicians and civil society organizations. A two-day meeting among parliamentarians was convened. This meeting, attended by the president, was held in Parliament buildings in November before the Parliament was to vote on the Raila motion and promptly break for recess. It was agreed that a Parliamentary Select Committee be formed to review the Constitution of Kenya Review Act (as amended in 1998) with a view to reaching a new consensus. This would retain the process within Parliament. According to the defenders of the Raila Committee, as the committee came to be known, the meeting the AG had been asked to convene would only have complicated matters (even though Odinga had himself asserted that the AG needed to convene the stakeholders because they were the original authors in the Safari Park consensus). Moreover, they argued that the Act was already firmly in the purview of Parliament and could not be discussed elsewhere.

With the Attorney General refusing to convene a meeting of the stakeholders, and with KANU and its cooperating parties seemingly intent on unraveling the Safari Park consensus and substitute a Parliament-led process, the religious groups went ahead and

called the meeting of the recognized stakeholders. All but the KANU and NDP representatives attended. According to the religious groups, they came together to pursue a technical agenda not a political one, in order to resolve the stalemate. This is how the Ufungamano Initiative was born. The initiative has since become a process unto itself surpassing its original goal of breaking a stalemate by pursuing the actual process of gathering views for the constitutional review exercise. In effect, though, the initiative increased the tension in the unfolding drama of re-starting the process.

The Parliamentary Select Committee chaired by Odinga ran into immediate problems in legitimating itself. First, it was attacked as being an illegal committee. Opponents argued that it was established by a flawed motion (according to Parliament's rules), because the initial motion was substantially amended to call for an instrument different from what was initially proposed.[9] Second, its legitimacy was severely eroded by its having sidestepped the stakeholders who authored the Act and inviting them to offer views instead of serve as negotiators. A walkout by committee members from other opposition parties (other than NDP) and a boycott of the debate that adopted the committee's report by all but one of the opposition parliamentarians complicated the Raila Committee's legitimacy. The bill emanating from the Committee's proposals was adopted in July, again furtively, by KANU and NDP parliamentarians when most of the other oppositionists were out of town on a political tour of the western provinces.

The Ufungamano Initiative sees its role as one of defending the Safari Park consensus to implement the Act as it is. Indeed, its make up, including representatives of civil society and religious organizations and political parties (except KANU and NDP), replicated the Act's stipulations. The religious leaders heading it assert that they have not ruled out dialogue but see the incumbent government as hesitant and bent on pursuing its own narrow agenda to keep constitutional review in its hands. The Ufungamano Initiative also sees political parties as having reneged on the Safari Park consensus. They therefore see their role as mediating and at the same time taking a position, which they would like the political parties to embrace. Some observers see this as a credible position given that the history of the Kenyan transition suggests the incumbent government has always had to be forced to make progressive change. The Ufungamano Initiative has an important role to play in not only restarting the process but also shaping the process to involve more players.

So far, apart from the debate, the press statements, and the opening up of an alternative way to review the constitution, the religious organizations have not embarked on any actual mediation work. Similarly, the Raila Committee, which completed its hearings (which the religious community did not attend) and whose bill was passed by Parliament, has not resulted in any substantive action with the new framework outlined under the Constitution of Kenya Act Amendment (2000). At present then there is a tension-filled lull with threats of or actual violence occurring in some instances especially against actors supportive of

[9] The substance of the motion by Odinga actually sought the AG intervention. That was then amended by George Anyona to call for a select committee of the House. This, according to critics, is contrary to Parliament's rules.

the religious organizations' initiative. For example, public rallies by opposition politicians supporting the Ufungamano Initiative have been violently disrupted by KANU and NDP youths and the Ufungamano commissioners have been threatened with violence.

The Impact of Intervention

The intervention by the religious community in the constitutional reform conflict has evolved substantially in the last four years. It is clear that the religious community is now at the center of the agitation for reform rather than as a mediator between two disagreeing contenders. In terms of the six factors considered earlier as sources and contours of the conflict there are notable qualitative impacts in four. In the other two there has been minimal impact. It should be noted that these latter two are macro conditions and therefore, short of a revolution, cannot be fundamentally transformed in the course of one intervention. Even in the four factors in which we can identify particular actions leading or likely to lead to some change, much of it is still conjecture. This reflects both the nature of the conflict (one about institutions rather than concrete material issues) and the incomplete status of the engagement.

Mobilization: One effect of the intervention is that it has restarted the process of constitutional reform. For example, it is unlikely the Parliamentary Select Committee headed by Raila Odinga would have been appointed had the religious groups not demanded (and held on their own) a meeting of the stakeholders to address the stalemate. In effect the religious community transformed the unorganized voices for re-starting the process of review into a coherent voice demanding and achieving some movement on the issue. Once again the religious organizations found a platform for this in the vacuum that existed in civil society to demand change. The main constitutional lobbies in civil society were inactive in 1999-2000, due to funding problems and a strategic malaise given the departure of some of its members (e.g., the NGO Council's representative) and the expired urgency of an upcoming election. Moreover, the political parties also lost momentum after losing the 1997 elections and instead shifted focus to parliamentary business.

Political Dynamics: Secondly, perhaps on the negative side, one result of the Ufungamano Initiative has been to deepen mistrust, both between the incumbent regime and the opposition and civil society and within the opposition. While the Raila Committee was in session, various accusations were traded in the media between the Committee and the rest of civil society. The Raila Committee was assailed repeatedly as a 'sell out' committee since Mr. Odinga had broken ranks with the rest of the opposition and was seen as promoting KANU's agenda. On the other hand, the religious community's Ufungamano Initiative was viewed by the government and by Raila Committee members as an illegitimate ethnic affair with no legal standing. It therefore became caught up in the ethnic discourses that have attended the transition.

Conflict Behavior and Events: The overall result of the Ufungamano Initiative has been to increase polarization and the potential for violent confrontation. The tension may be unmanageable, especially given threats from cabinet ministers and their supporters to use violence to disrupt the Ufungamano meetings (Daily Nation, various dates 2000). Rather ominous is a less prominent effort by NCEC to sensitize people on reform and to prepare provincial National Convention Assemblies (NCAs) has been the target of violent attacks by supporters of the ruling party and of the cooperating political party, NDP.

It is also possible that the parallel processes may exacerbate conflict in that they may produce mutually exclusive documents, one with legitimacy from the people, the other with legal sanction institutionalized in Parliament. Given the two would be singular points of focus for the conflict, given the timing would be even closer to the imminent succession, and given the implications of each proposal on the succession would be clear and probably contradictory, the tension could easily lead to political violence. A situation reminiscent of the 1991-92 and 1997 ethnic clashes instigated to force constitutional and electoral agendas is not unfathomable.

A number of analysts, however, do not see the parallel processes as inherently problematic but as a productive and necessary step to gaining momentum for constitutional review. The potential for violence is, in fact, lessened by the existing conditions of a general fatigue and wariness about mass action and by economic insecurity that have made mass action unlikely. This may be a rather optimistic view, though, given the events that have already unfolded.

Public Institutions and Processes: The mediation effort has had very little impact on public institutions, such as the provincial administration or the police, the two organs usually active in the transition conflicts. (It should be noted, however, that no effort was directed at these institutions.) The latest intervention by the church is likely to have an impact on Parliament and political parties. The political parties have been rather ineffectual in rallying support and pressure for change and have had to follow the lead of the religious groups, very much as in 1997 with the NCEC lobby. One effect of this could very well be the further marginalization of political parties in the reform process. The other has been to assert even further the right of organized groups in civil society to engage directly in constitutional reform rather than leave everything to Parliament. This is a positive development, since it allows for a wider range of interests to be represented and minimizes the possibility of conflict arising out of exclusion.

Concurrent to this is the fact that, by its very nature and its most central argument, the Ufungamano Initiative, engineered by the religious community, effectively undermines the legitimacy of Parliament by showing it incapable of handling the very core issues of the republic. The initiative posits rather powerfully, although not yet successfully, the notion that parliamentary processes are inadequate for arriving at fundamental reviews of the social contract. This notion is both a philosophical one and one borne out of the suspicion directed at the Parliament, dominated as it is by KANU and given to significant departures in form and substance from actions that may consolidate democracy in Kenya. While the philosophical argument is credible, the overall effect of this challenge and certainly of any success to the Ufungamano Initiative is, at least in the short-term, the further weakening of already weak institutional structures of democracy, including Parliament.

Socio-Economic and Social Structure: The impact on socio-economic factors and on the social structures have been minimal and in fact beyond the expectations of the intervention. In particular given the absence of a conclusive end to the latest intervention, there is no secondary effect felt in mitigating the current economic crisis. Moreover, the economic decline has many other immediate causes including excessive corruption, the

withdrawal of foreign aid, and an inhospitable environment for investors. These are issues outside the immediate purview of the intervention and, more specifically, ones that constitutional reform, once resolved, will not impact immediately or directly.

Similarly, it is not reasonable to expect that the intervention to mitigate the conflict over the constitution can have an immediate effect on the structure of Kenyan society and especially the ethnic and patrimonial bases of politics. Indeed, it is more reasonable to view the intervention as captive to the dynamics of ethnic mobilization, suspicion, fragmented coalitions, and patrimonial networks. Once again, only a successful constitutional reform effort—not an intervention to re-start the process—has any chance of changing the nature of power and competition for it in Kenya.

Update: August 2000-March 19, 2001

As suggested above, the constitutional reform debate took the familiar trajectory of an escalation of conflict, a stalemate, the threat or actual use of violence, and a mutual pull-back as protagonists calculated threats to common interests. The critical role played by an outsider perceived to be neutral, which had been foreclosed internally when the religious organizations became contenders rather than mediators, was restored by the entry of Professor Yash Ghai, who was appointed head of the Parliamentary-mandated Constitution Review Commission of Kenya. A Kenyan of Asian descent and currently a professor of law in Hong Kong, Mr. Ghai also has personal relationships with many in the opposition, dating from his time on the law faculty in Nairobi after independence. His appointment and his refusal to take the oath of office before seeking a merger with the Ufungamano group proved to be what was needed to avoid violent confrontations. Further dialogue has unfolded since his appointment in November, leading to a current formula for a merger.

At the completion of this report, the merger was imminent, although some members of the Ufungamano initiative, principally the civil society organizations, were sufficiently disenchanted with the merger terms that they had threatened to withdraw. It is too early to tell whether this proposed merger—weeks in the making—will be of consequence. Suffice to note that these are the groups that fired up the constitutional review demands from the very beginning, engineered the 1997 spate of street confrontations leading to the reforms of 1997, have no history of compromise with the state (as the religious groups do, at times embarrassingly so), and are likely to influence the review efforts within or outside its bounds.

In the meantime, while the negotiations over the process are completed, and, if they survive the current crisis and contentiousness over the merger as presently conceived, a new arena of contestation will be opened on the substance of reform. This is likely to produce even more conflict as a larger set of actors are likely to articulate their interests as the debate moves from a procedural one to a substantive one. Moreover, the possibility of violence is pronounced, given that violence has in recent times become more a tool of advancing substantive preferences (e.g., elections, land) than one of advancing procedural

issues (for which violence is meted out to individual protagonists rather than to entire communities).

The Regional and International Context

Clearly, the contextual and situational factors at the local, national, regional, and global level affect the implementation of interventions such as the one considered here. The preceding focuses mainly on local and national factors as the most critical to the design, implementation and impact of the intervention. Indeed, regional and global factors have had little to do with the unfolding constitutional crisis and the churches' intervention. The diplomatic pressure from the former US Ambassador and the work of the former German Ambassador in encouraging a settlement in 1997 suggest the impact that can be had by international actors, but at close quarters. This also seems to arise out of personal initiative and contacts rather than explicit policy direction. Moreover, there was no evidence to indicate any deliberate connection between the intervention by religious organizations and these representatives of foreign missions.

At a macro level, in the post-cold war environment, there is little evidence to suggest that foreign governments and donors (such as the United States, Britain, and Germany) intervene at the level of conflict discussed here. There are simply too many such conflicts in countries under transition. Others, such as the World Bank and the IMF, which clearly have an interest in improving good governance, maintain an apolitical stance focused on awaiting a conclusive outcome rather than facilitating the inherently murky political process. It is only when a situation is clearly tending toward collapse (e.g., the land takeovers in Zimbabwe, the return to civil war in Angola, and the Congo crisis) that international institutions and foreign governments intervene.

Finally, the regional context has not produced much in the form of pact-making precedents to resolve deep constitutional and transition questions. With the exception of the sovereign national conferences that characterized early transitions in Francophone Africa (Robinson), there have been no systematic pathways to democratization in Africa, especially in Anglophone countries. In the day-to-day life of strategy and action, little in the way of comparative experiences is considered, except after the fact, and mostly by academics. For example, throughout most of the 1999-2000 intervention, Ugandan clergy were engaged in an effort to mediate between political parties and the ruling Movement government in the no-party democracy referendum. None of our sources made reference to this effort and its outcome. Neither did the experience of constitutional review in Zimbabwe (very similar to the Kenyan context) feature in discussions. Overall, therefore little in the regional or global context has had a noticeable influence in the interventions discussed here.

Consequences and Conclusions

The consequences of the transformation of the religious organizations from mediators to central contenders under the Ufungamano Initiative are unclear. Moreover, the mixed historical trajectory of a build up in tension, escalating to violent confrontation and sometimes breakthrough negotiations among elites, does not offer a clear indication of the direction the current stalemate may take. There is a track record of mediated settlements, however, especially as parties to a conflict experience "hurting stalemates." For example, in 1997 and 1998 the mediation efforts were initiated and were largely effective because the threat of violence and breakdown of law and order was so evident. The imminent merger between the Ufungamano Initiative and the Parliamentary Review Commission under Prof. Yash Ghai is indicative of this trajectory. There is also an established penchant among the parliamentary parties and especially the governing party for channeling very divisive disagreements through institutional structures, especially Parliament, which has so far remained an arena where amicable agreements can be reached and cloaked in institutional legitimacy.

In this connection, there are evident tracks that could be used for pursuing negotiations to resolve the stalemate. For instance, more than a handful of the principal actors repeatedly referred to the previous examples of successful negotiations and the contacts still available through the prevailing networks within Parliament. There is therefore willingness and ability to pursue negotiation and an openness to external facilitators. The religious organizations' role as mediators is certainly compromised given their very activist stance and transformation into contenders for directing the constitutional review. It is premature to make any conclusions at the moment, however, as there are several stages yet to unfold and several issues yet to be settled. How each is settled will affect the extent to which the possibility for peaceful resolution is broadened, narrowed or, perhaps, eliminated altogether. The resolution of the constitutional conflict and indeed the cumulative impact of the iterative interventions by the church are therefore open questions.

In terms of replication and policy options, this study presents some options, but a caveat is in order. The very peculiar circumstances of an incomplete transition in Kenya since 1990 shaped the actors and interests and constrains certain possibilities. One cannot understand the choices made, therefore, without reference to the constraints of the peculiar history of the incomplete transition. These strategies are not particularly transferable since they are made to satisfy certain peculiarities rather than maximize responses to certain generic conflict issues that may arise in other situations.

Despite this caveat, three things are clear: 1) national level dialogue can produce significant progress in agenda setting, procedural terms, and, eventually, substantive change while avoiding violent confrontation; 2) religious organizations can be important mediators, especially if they have a track record of social engagement and embrace a more expansive notion of their social role to include political change; and 3) coalitions with civil society organizations with the capacity for analysis and mobilization outside the

religious groups and with partisan organizations, if their partisanship is restricted, are useful to securing reform goals.

While the capacity of the Ufungamano Initiative was always in peril due to financial constraints (their effort to raise funds from the public never materialized), their refusal to seek funds from foreign donors was critical to maintaining substantive and perceived independence. (This was especially important in a situation where the incumbent government was more than willing to accuse the opposition of being funded by foreigners and, therefore, illegitimate.)

There are several opportunities for other types of intervention that may facilitate the dialogue to resolve the procedural impasse and substantive reforms as the constitutional review takes off. For example, peace radio could be used to inform and advocate open dialogues and to deliver civic education. This possibility is remote in Kenya, however, because of the incumbent government's restrictive policy toward independent radio stations. Other forms of interventions exemplified by other studies may be useful, though. For example, partnerships with donors and African institutions can be useful in advancing the process once the actual reform work has commenced. Supporting an open process would require substantial outlays of resources that only donors can provide with some credibility to reduce the reliance on the (often-suspicious) state machinery. Similarly, African institutions such as the constitution-focused research and advocacy institutes in Nigeria, South Africa, and Uganda, may offer useful lessons from their own experiences.

Fundamentally, any intervention in this area needs to proceed from well-informed analysis of the current situation at any given moment and on a contingent basis, as the process is likely to be contentious to the very end.

References

"90 MPs to Bar Law Reform Bill." Daily Nation 15 June 2000: 3.

"A Promising Start in Review Exercise." Daily Nation 11 Jan 2000: 6.

"Aid to Resume Soon." Sunday Nation 23 Jan 2000: 4.

"All's Not Well with Review Committee." Daily Nation 16 Feb 2000: 6.

"Anger Over Kanu's Secret Reform Deal." Daily Nation 21 Feb 2000: 3.

"Appendix 2."People Building Peace Through the Internet – A List of Websites." 400-402.

"Arrogance that Calls for a Sacking." Daily Nation 18 Jan 2000: 6.

"Back into Quagmire of Reform Deadlock." East African Standard 20 June 2000: 6.

"Ban Those Parties That Break the Law." Daily Nation 2 Feb 2000: 6.

"Church Council Bridges the Ethnic Divide." Voice of the Voiceless in Kenya." 210-213.

"Churches Split Over Review Process." Daily Nation 10 Feb 2000: 5.

"Clashes Fear as Terror Toll Rises." Daily Nation 21 Jan 2000: 2+.

"Clerics Plead for Positions." Daily Nation 3 Feb 2000: 44.

"Constitution: Why Not Heed Nyagah?" Daily Nation 9 May 2000: 6.

"Dangerous Talk of Popular Action." Daily Nation 3 Jan 1998: 6.

"Each Citizen Must Feel That They Count." Daily Nation 14 Mar 2000: 8+.

"Evangelical Group Backs Ufungamano." Daily Nation 16 Feb 2000: 5.

"Faith Tackles the Question of Legality." Daily Nation 28 Jan 2000: 3.

"Five Clerics Arrested Over Reform Prayers." Sunday Nation 20 Feb 2000: 3.

"Githongo, John. "Who'd Buy a Used Constitution From Us?" The East African 10-16 Apr 2000: 11.

"Group Illegal Claims Raila." Daily Nation 16 Mar 2000: 3.

"He Will Be Irrelevant." Finance 27 Jan 2000: 13.

"How to Get More." Daily Nation 17 March 2000: 8+.

"How Wanjiku Can Secure Our Future." Daily Nation 13 Mar 2000: 8+.

"Keep Off Politics, Moi Tells Churches." Daily Nation 7 Jan 2000: 2.

"Kenya: *After Multi-party Politics, a One Party Style.*" *Africa Confidential.* Vol. 35 No.14 (1994): 1-3.

"Kenya: *L'adieu au Vieux I*." *Africa Confidential.* Vol. 35 No.3 (1994): 5-6.

"Kenya: *Political Update September 1994.*" *International Republican Institute.* 1994. 1-19.

"Kirimi Criticises Review Strategy." Sunday Nation 30 Jan 2000: 4.

"Law Review: Why Not Compromise?" Daily Nation 8 Apr 2000: 6.

"Looking for Stability In the Transition Plan." Daily Nation 15 Mar 2000:8.

"Making the Chief Answerable to Us." Daily Nation 16 Mar 2000: 8+

"Mass Action Won't Help Our Country." Daily Nation 13 Apr 2000: 6.

"Ministers Take on Tribalists." Daily Nation 19 June 2000: 1+.

"Moi Will Not Quit Yet, Says Minister." Daily Nation 19 June 2000: 2.

"MPs Tell of Plans to Block Report." Sunday Nation 26 Mar 2000: 3.

"Muslims to Discuss Law Reivew." Daily Nation 24 June 2000: 4.

"Nassir Steps Up Attacks on VP." Daily Nation 14 Feb 2000: 3.

"Nassir's Remarks Cause for Concern." Sunday Nation 13 Feb 2000: 6.

"NCEC Wrong Again." Daily Nation 11 June 2000: 6.

"No Land for Aliens in Towns, Says Moi." Daily Nation 21 Jan 2000: 4.

"Nyachae Says 'No' to Reforms Boycott Plan." Daily Nation 15 Apr 2000: 1+.

"Nyachae, Karua Dismiss Report." Daily Nation 20 April 2000: 16.

"Nyagah: Revive Review Process." Daily Nation 12 Mar 2000: 5.

"Party Hopes Process Will Take Two Years." Daily Nation 8 April 2000:3.

"Police Disperse 'Clean Air' Meeting." Sunday Nation 23 Apr 2000: 4.

"Police to Blame for Violence in Kisumu." Daily Nation 24 June 2000: 6.

"Police Want Mwenje Bonded to Keep Peace." Daily Nation 25 Jan 2000: 4.

"Political Thuggery That Shames Us All." Daily Nation 15 Jan 2000: 6.

"Putting Together a Non-Partisan and Responsible Public Service." 17 Mar 2000: 9.

"Raila Can't Fool Moi." Finance 27 Jan 2000: 12.

"Raila gives faith team 4-day notice" Sunday Nation 18 March 2001. Website.

"Raila Opens the Debate on Review." Daily Nation 20 Apr 2000: 17.

"Reform Critics Set for Rally." Daily Nation 10 Jan 2000: 1+.

"Reform: Adopt Give and Take Approach." Daily Nation 13 Jan 2000: 6.

"Reforms Debate on Despite Walk-out." Daily Nation 20 April 2000: 16.

"Religious Leaders for Uhuru Park Meeting." Daily Nation 7 Jan 2000: 3.

"Rethinking Citizenship in Africa." *Africa Today.* Vol.45 No.3-4 (1998): 351-367.

"Review Process Worries President." Daily Nation 29 March 2000: 2.

"Select Team to Invite Public." Daily Nation 29 Jan 2000: 28.

"Since Corruption, Mismanagement and Waste Are Some of the Key Problems in the Country, Can the Constitution Help Solve Them?" Daily Nation 18 Mar 2000: 8+.

"Small Scale Conflicts Could Have Major Repercussions. "An Overview of Conflict Prevention and Management Activities." 146-155.

"Stalemate: Kibwana Blames Opposition." Daily Nation 12 March 2000: 3.

"Students Vow to Disrupt IMF Talks." Daily Nation 17 Jan 2000: 4.

"Such Threats Are No Good for Kenya." Daily Nation 1 May 2000: 6.

"The Future of Democracy in Kenya." *Africa Today.* Vol.45 No.2 (1998):161-258.

"This Is the Kind of Sobriety We Need." Sunday Nation 23 April 2000:6

"Torture Victim Dies in Hospital." Daily Nation 28 Jan 2000: 4.

"Ufangamano Rejects Mass Action." Sunday Nation 23 Apr 2000: 3.

"Ufungamano Launches Plans." East African Standard 20 June 2000: 5.

"Violence Must Not Obscure Real Issue." Daily Nation 18 Jan 2000: 6.

"We Shall Repossess Plot, Vow DP Men." Sunday Nation 16 Apr 2000: 4.

"Worrying Trends in Church-State Links." Daily Nation 25 Jan 2000: 6.

Amisi, Bertha Kadenyi. Conflict in the Rift Valley and Western Kenya: *Towards an Early Warning Indicator Identification*.

Aringo, Peter Oloo. "The Constitution Making in Kenya." Finance 13 Apr 2000: 8-12.

Chege, Bernard and Lucas Barasa. "MP's Fury Over Violence Threat." Daily Nation 1 May 2000: 1+.

Cohen, John M. Foreign Aid and Tribal Issues in Kenya. Cornell Univerisity, 1995.

Conflict Resolution Programming Framework. Muticon: Kenya.

Geekie, Russell. "Split Decision." *Kenya*. Mar: 13-19

Issuance of Title Deed by Commissioner of Lands. Transcript. 1999.

Kaiye, George and Damson Ong'er. "House Report Backed." Daily Nation 14 Apr 2000: 20.

Kariuki, Sospeter L. "Constitution Belongs to Us All." Daily Nation 13 May 2000: 7.

Kia, Mugambi and Willy Mutunga. "The Regime is Drinking Wine and Offering 'Wanjiku' Water." Sunday Nation 16 Jan 2000: 8+.

Kiai, Mugambi and Willy Mutunga. "Signs of Another IPPG Before 2002 Elections." Sunday Nation 16 Apr 2000: 8+.

Kiaye, George. "Don't Come to Kisumu, NCEC Told." Daily Nation 20 June 2000,

Kiaye, George. "Youth Beat NCEC Officials." Daily Nation 23 June 2000: 2.

Kibwana, Kivutha. "Document Stabs in the Back the Very Values It Purports to Support." Sunday Nation. 7 May 2000: 9.

Kithi, Ngumbao. "NCCK Rejects Mass Action." Daily Nation 22 Apr 2000: 1.

Kombo, Muskari. "Kenya's Constitution Deadlock." Finance 13 Apr 2000:13-14.

Kuria, Gibson Kamau. "The Constitution of Kenya Review (Amendment) Bill, 2000." Finance 20 Apr 2000:14-15.

Lumwamu, Kennedy and Muco Njeru. “Take Risks, Kenyans Urged.” Daily Nation 28 Feb 2000: 44.

Maina, Wachira, “Dialogue the Way Out of Stalemate.” Sunday Nation 30 Jan 2000:8+.

Maina, Wachira. “Where is Raila Team Going?” Sunday Nation 16 Jan 2000:15+.

Makokha, Kwamchetsi. “A Crisis of Legitimacy Plagues Review Forces.” Daily Nation 4 Feb 2000: 6.

Makokha, Kwamchetsi. “This Could Mean Kanu Is Ready for Dialogue.” Daily Nation 28 Apr 2000: 6.

Management Systems International. Kenya Democracy & Governance Assessment. Washington, D.C. 1998.

Mathenge, Patrick. “We Don’t Support Our Bishops.” Daily Nation 11 Feb 2000: 7.

Mbitiru, Chege. “Moi’s Hand in the Report.” Finance 20 Apr 2000: 16-17.

Mburu, Stephen. “Constitution Reforms: All Must Be Heard.” Daily Nation 10 Feb 2000: 8.

Mugonyi, David and Owino Opondo. “Reforms Rift Widens.” Daily Nation 8 Jan 2000: 36.

Mugonyi, David and Samuel Siringi. “Radical Lobby Calls for Violent Change.” Daily Nation 30 Jan 2000: 1+.

Mugonyi, David. “Arson Attacks No Big Deal – Nassir.” Sunday Nation 16 Jan 2000: 4.

Mugonyi, David. “Catholic Church ‘To Fight Injustice’.” Daily Nation 9 Jan 2000: 3.

Mugonyi, David. “LSK Says Raila Team Is Illegal.” Daily Nation 12 Mar 2000: 3.

Mukiebe, Florence. “Arrest Nassir Over Threat, Says Ndingi.” The Standard 3 May 2000: 2.

Mulaa, Adieri. “AG Speaks on New Referendum.” Daily Nation 9 May 2000: 2.

Mulei, Christopher. Electoral Violence in Kenya: *Diagnosis and Prognosis*.

Murathe, David. “MP Wants Review Process Suspended.” Daily Nation 31 Mar 2000: 4.

Mureithi, Francis. “FKE: Unite on Reforms.” Daily Nation 13 Mar 2000: 5.

Murungi, Kiraitu. “Is the Call to Mass Action an Invitation to Violence?” Sunday Standard 7 May 2000: 8.

Musembi, Oliver and Said Wabera. “Scores Injured in Thika Youth Rally.” Sunday Nation 27 Feb 2000: 1.

Musembi, Oliver. “Group Calls for a Parallel Government.” Sunday Nation 6 Apr 2000: 3.

Mutua, Joseph. “Genesis of Review Stalemate.” Daily Nation 25 Feb 2000: 7.

Mutua, Joseph. “Why Review Stalemate Exists.” Daily Nation 28 Mar 2000: 7.

Mutua, Makau Wa. “Ticking Time Bomb.” *Kenya.* July: 20-22.

Mwale, Sam. “Raila Report a Hotchpotch of Contradictions.” The East African 17-23 Apr 2000: 9.

Ndanyi, Mathews. “Rift Valley People Want Mass Action.” The People 12 June 2000,

Njagi, Anthony and Wahome Thuku. “Church Calls Day of Prayer.” Daily Nation I May 2000: 3.

Njau, Mutegi. “Losers Demand Election Repeat.” Daily Nation 3 Jan 1998: 1

Njuguna, Michael. “Tough Order on Inciters.” Sunday Nation 12 Mar 2000:1+.

Nowrojee, Binaifer, and Bronwen Manby. “Divide and Rule.” *Kenya.* Sept: 32-34.

Nowrojee, Binaifer. “Pressure for Change.” *Kenya.* Jan: 39-41.

Nyamu, Habel. “The Right to Review the Laws Belongs to the Kenyans.” Daily Nation 18 April 2000: 6

Nyukuri, Barasa Kundu. The Impact of Past and Potential Ethnic Conflicts on Kenyan’s Stability and Development. Kikuyu, Nairobi, 1997.

Omari, Emman. “Raila Team Gives a Key Role to Moi.” Daily Nation 7 Apr 2000: 1+.

Ooko, Aola Sone. “Ufangamano Is Dutch-financed, Claims Nassir.” The People 12 June 2000: 2.

Opondo, Owino and David Mugonyi. “Reforms Race Is Revived.” Daily Nation 28 Mar 2000: 36.

Opondo, Owino. “It’s Prayers Again, this Time for House Team.” Daily Nation 24 Jan 2000: 1+.

Opondo, Owino. “Ufangamano Team to Finalise Its Plans.” Daily Nation 18 Mar 2000: 3.

Opondo, Owino. “Wako’s Warning to NCEC.” Daily Nation 18 April 2000: 2.

Opondo, Owino. “We Haven’t Negotiated, Say Clerics.” Daily Nation 25 Jan 2000: 3.

Oywa, John and Damson Ong’er. “Raila, Orengo Face Off.” Daily Nation 15 May 2000: 1+.

Oywa, John and William Orende. “Rebel Rallies to Test Raila Pact.” Daily Nation 30 May 2000: 1+.

Post Easter Blessings? *The Appointment Ceremony of the Ufungamano Initiative Constitutional Review Commissioners.* Kenya, 2000.

Republic of Kenya. National Assembly. *Report of the Parliamentary Select Committee Reviewing the Constitution of Kenya Review Act, 1997. 8th Parliament, 4th Session. Nairobi: Parliament Buildings, 2000.*

Republic of Kenya. Kenya Gazette Supplement. Bill for Introduction into the National Assembly: *The Constitution of Kenya Review (Amendment) Bill, 2000*. *Nairobi: The Government Printer, 2000.*

Rugene, Njeri. “Bodies Criticise Polling Process.” Daily Nation 3 Jan 1998: 3

Rugene, Njeri. “Debate on Report Was One-sided.” Daily Nation 9 May 2000: 2.

Rugene, Njeri. “Moi Stand on Reform Critised.” Daily Nation 29 Mar 2000: 48.

Rugene, Njeri. “New Bill to Be Passed Smoothly.” Daily Nation 9 May 2000: 3.

Rugene, Njeri. “Raila Report Is Passed by MPs.” Daily Nation 27 Apr 2000: 1+.

Ruhiu, Loise Gathoni. Corruption in Kenya: *Only I Have the Answer.* Nairobi: Oakland Media Services Limited.

Sekoh-Ochieng, Jacinta. “Lawyers Call For Special Tribunal.” Daily Nation 13 April 2000: 52.

Shimoli, Eric. “MP’s Fist-fight Over Reforms.” Daily Nation 21 Jan 2000:1+.

Siringi, Samuel and Wahome Thuku. “Mayhem as Reform Rivals Clash.” Sunday Nation 16 Jan 2000: 3.

Siringi, Samuel. “FKE for Joint Review Institute.” Sunday Nation 27 Feb 2000:32.

Southall, Roger. “Re-forming the State? Kleptocracy & the Political Transition in Kenya.” *Review of African Political Economy.* 79-93:108 (1999): 93-108.

Strategic and Responsive Evaluation of Peacebuilding. Kenya 1999.

Sunday Nation Team. “Observers: Accept Election Results.” Sunday Nation 4 Jan 1998, nat’l ed.: 1+.

Tanui, Kipkoech and Chege wa Gachamba. “Law Review Group and MPs Meet.” Daily Nation 23 June 2000: 2.

Tanui, Kipkoech and Mugo Njeru. “Crack Unit to End Laikipia Killings.” Sunday Nation 23 Jan 2000: 1+.

Tanui, Kipkoech. “Moi Blamed for Laikipika Terror.” Daily Nation 24 Jan 2000: 1+.

The Social Democratic Party of Kenya. Proposals on Amendments to the Constitution of Kenya Review Commission Act. Nairobi,1998.

The Ufungamano House Initiative vs. The Raila Odinga Parliamentary Committee: *Constitutional Reform in Parliament, In the Churches/Mosques, or in the Streets.* Kenya, 1999.

Tostensen, Arne, Bård-Anders Andreassen, and Kjetil Tronvoll. Kenya’s Hobbled Democracy Revisited: *The 1997 General Elections in Retrospect and Prospect*. Oslo: Universitetsgata, 1998.

Wa Gachamba, Chege. “Gitari and Kanu Men Hold Talks.” Daily Nation 28 Apr 2000: 2.

Wa Gachamba, Chege. “Gitari Says ‘No’ to Raila Appeal.” Daily Nation 15 Mar 2000: 2.

Wa Gachamba, Chege. “NCCK Meeting to Draft Reform Paper.” Daily Nation 13 Apr 2000: 52.

Wa Gachamba, Chege. “Reject This Report the NCEC Advises.” Daily Nation. 8 Apr 2000:2.

Wa Gachamba, Chege. “Review to Cost Sh230m.” Daily Nation 21 June 2000: 2.

Warigi, Gitau. “If More than 74 MPs Vote or Abstain, the Bill Would Be a Non-starter.” Sunday Nation 23 Apr 2000: 8.

Warigi, Gitau. “Kanu Has a Crafty Plot to Retain the Presidency.” Sunday Nation 16 Apr 2000: 6.

Warigi, Gitau. “MPs Dig In Over the Select Team’s Report.” Sunday Nation 16 April 2000:8+.

Weeks, Willet and Crawford Young. Conflict Management in Kenya. 1996.

Persons Interviewed

1. Mr. John Munuve
2. Ms. Betty Wamalwa
3. Mr. Eric Richardson
4. Dr. Ooki Ombaka
5. Mr. Erastus Wamugo
6. Mr. Wachira Maina
7. Rev. Mutava Musyimi
8. Dr. Willy Mutunga
9. Dr. Karuti Kanyinga
10. Mr. Patrick Lumumba
11. Hon. Prof. Anyang Nyongo
12. Hon. George Anyona
13. Hon. Julius ole Sunkuli
14. Hon. Joseph Kamotho
15. Hon. Jembe Mwakalu
16. Ms. Abida Ali
17. Hon. Amos Wako
18. Ms. Joyce Umbima